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NOTES.

ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF TRADE—In 1902, five companies producing over eighty-five per cent. of all the harvesting machinery sold in the United States sold their plants and property to the International Harvester Company, which was organized with a total capital of $120,000,000, in return for stock of the new company.[1] Later another company was acquired and the companies thus combined manufactured a still greater percentage of the harvesting machinery used in the United States and nearly the whole of that exported. Prior to consolidation, these companies were in keen competition for trade. The result of the combination was to eliminate all the competition. The District Court in *United States* v. *International Harvester Company*[2] dissolved this corporation, declaring that it was illegal and violated the Sherman Act of 1890. The court held that the statute must be construed in the light

[1] For a clear illustration of the usual method of forming such companies, see 16 HARV. L. R. 85 (1902).

[2] 214 Fed. Rep. 987 (1914).

of reason, that is, there is no possibility of frustrating it by resorting to any disguise or subterfuge of form; that this combination was in restraint of trade, because it substantially suppressed all competition between five companies which at the time controlled the greater portion of the interstate and foreign commerce in the article, though if they had been small companies and their combination had been essential to enable them to compete with large companies in their line, their uniting would not have been in restraint of trade; that this company was from the beginning in violation of the first and second sections of the Sherman Law.

The Sherman Act of 1890 illustrates the hostility and fear that the public entertained toward the large corporations, pools, trusts and combinations of that time. Although entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," it was really intended to secure the freedom of engaging in interstate and foreign commerce, for it is immaterial that the combination would increase the volume of interstate traffic and thus benefit the public.[3] Section One declares illegal "every contract, combination or conspiracy in restraint of trade or commerce among the several states, or with foreign nations"; and further declares that "every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor," and be punished accordingly. Section Two declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire, with any other person or persons to monopolize any part of the trade or commerce among the several states or foreign nations" shall be guilty of a misdemeanor and punished accordingly. Section Four gives the Circuit Courts of the United States jurisdiction to prevent and restrain the violations of this Act by equity proceedings instituted by the several district attorneys of the United States. Section Seven declares that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any Circuit Court of the United States and recover threefold the damages by him sustained."[4]

This statute by declaring certain acts to be crimes is purely a criminal statute but is peculiar and extraordinary in that it empowers the courts to prevent the commission of the acts and thus the courts

[3] U. S. v. Northern Securities Co., 120 Fed. Rep. 721 at p. 730 (1904).

[4] Under this section a purchaser who has been compelled to pay an enhanced fine brought about by an unlawful combination may recover the difference between that price and the price which would have prevailed but for the combination. Chattanooga Foundry Pipe Works v. Atlanta, 203 U. S. 390 (1906); Thomson v. The Union Castle Mail S. S. Co., 149 Fed. 933 (1907). See also Mines v. Scribner, 147 Fed. Rep. 927 (1906); Hale v. O'Conner Coal Co., 181 Fed. Rep. 267 (1908). Some cases have gone so far as to hold that where the defendant combination has refused to deal with the plaintiff he may never recover treble damages. Ellis v. Inman Paulson & Co., 131 Fed. Rep. 182 (1904).

can prevent the commission of a crime before it is committed. It might also be observed that the courts are authorized to proceed only by way of prevention and restraint,[5] yet the courts grant relief by the affirmative decree of dissolving past acts and restoring combinations to their *status quo* before the agreement, transfer, or whatever brought about the combination.[6] Langdell criticizes this severely,[7] claiming that such a "decree is a mere act of arbitrary power and utterly without justification or excuse," in referring to the decree ordering the dissolution of the Northern Securities Company. If the courts did not adopt this method of dealing with such combinations the statute would not be of much practical value for it would be next to impossible to discover those about to violate the Act, as its violation is discovered only after the act has been committed.

Under the Act, real trusts were held to be illegal in 1890[8] and are practically non-existent at present. Pools have also been declared illegal,[9] and it was thought that if the combining parties formed a corporation as a legal entity in itself, instead of the loosely joined "pool" composed of a number of corporations joined by agreement among themselves alone, the court would not apply the Act, because a corporation being a person could not "contract" or "conspire" by itself alone. This idea was exploded by the Northern Securities Case, which represents the present view that it is immaterial what form the combination takes, for "if the contract or combination does actually produce a restraint it is void even though on its face it does not call for such restraint."[10]

Other combinations which have been attacked under this Act may be classified as follows: (1) Cases involving combinations and conspiracies by means of physical force or threats or boycott, to prevent others from engaging in interstate commerce.[11] (2) Cases involving contracts or combinations among railways engaged in interstate commerce to eliminate competition or to increase or prevent a reduction of the interstate rates.[12] (3) Cases involving contracts or combinations that merely prevent or diminish competition among those contracting or combining, without restraining the trade of others and without constituting a monopoly. Though literally the

[5] U. S. v. E. C. Knight, 156 U. S. 1 at p. 17 (1895).

[6] U. S. v. Northern Securities Co., 193 U. S. 197 (1904).

[7] 16 HARV. L. R. 539 (1902).

[8] People v. North River Sugar Co., 121 N. Y. 582 (1890).

[9] U. S. v. Addyston Pipe & Steel Co., 175 U. S. 211 (1899).

[10] Northern Sec. Co. v. U. S., 193 U. S. 197 (1904); Gibbs v. McNeely, 118 Fed. Rep. 120 (1902).

[11] *In re* Debs, 158 U. S. 564 (1896); Loewe v. Lawlor, 208 U. S. 274 (1908).

[12] U. S. v. Trans. Mo. Freight Assn., 166 U. S. 290 (1897); U. S. v. Joint Traffic Assn., 171 U. S. 505 (1898); Northern Securities Co. v. U. S., 193 U. S. 197 (1904). For a criticism of this last case see 16 HARV. L. R. 539.

Act applies to such cases, yet it has not been so applied and covenants in restraint of trade have been upheld and determined valid or invalid by the common law principle whether the restraint imposed was reasonable or not.[13] An individual may make an exclusive contract of sale of his product for a term of years and such is valid unless the purchaser was acquiring control of the market by obtaining a number of such contracts.[14] The reason given why the Act does not apply to such cases is that it was not passed to protect individuals against the consequences of their own acts, but to protect trade and commerce of the community.[15] (4) Cases involving monopolies in the hands of individuals. The Act has never been applied to an individual owner of a natural monopoly, that is, one created by nature, nor to an individual patentee even though he may restrain trade by having the monopoly of the manufacture and sale of the patented article,[16] but if the restraint arise from the combination of several natural monopolists[17] or several patentees[18] it will be declared void, even though literally the Act applies to both. These exceptions like those in the third class fall in the fifth class. (5) Cases involving combinations or conspiracies to monopolize any part of interstate or foreign trade or commerce. Under this heading the bulk of the important cases fall, including the Harvester Case. No case has arisen involving any decision as to the application of the provision of the Act to an attempt to monopolize, nor has any case been decided on the ground of a monopoly alone as the second section of the Act seems to indicate, but invariably the first section is made to play an important part in the case and a "restraint of trade or commerce" is always found. A monopoly is generally held to exist when most of the selling and buying in a particular article is in the hands of the combination, so the real question seems to be whether the combination has acquired such control of that commodity in the market that it can dictate its own terms of the buying and selling. Every case depends on its facts and the courts will be influenced greatly by the following: (1) The methods used in achieving the control the combination has. If they were unfair and improper it is likely to prejudice the court against the combination in

[13] Phillips v. Iola P. Cement Co., 125 Fed. Rep. 593 (1903); McConnell v. Camoro McConnell Co., 152 Fed. Rep. 593 (1907); U. S. v. Amer. Tobacco Co., 221 U. S. 106 at p. 179 (1911); U. S. v. Trans. Mo. Freight Assn., 166 U. S. 290 (1897).

[14] Chesapeake & Ohio Fuel Co. v. U. S., 115 Fed. Rep. 610 (1902); U. S. v. Reading Co., 226 U. S. 324 (1912).

[15] 10 COL. L. R. 694 (1910); 22 HARV. L. R. 499 (1909).

[16] Goshen Rubber Works v. Single Tube Tire Co., 166 Fed. Rep. 431 (1908).

[17] U. S. v. Jellico Mt. Coal Co., 46 Fed. Rep. 432 (1891); Chesapeake & Ohio Fuel Co. v. U. S. 115 Fed. Rep. 610 (1902).

[18] Standard Sanitary Mfg. Co. v. U. S. 226 U. S. 20 (1912); Ind. Mfg. Co. v. Machine Co., 154 Fed. Rep. 365 (1907).

a close case. (2) The percentage or extent to which that control extends. The Act would not apply to an acquisition of control of less than fifty per cent. of the commerce in an article but has generally been applied to a control over seventy-five per cent. (3) The presence or absence of intent to control the market. Great stress was laid on this in the Standard Oil and Tobacco Cases.[19] Many previous cases considered this as immaterial [20] unless there is a close question of fact whether there is or is not control of the market. As every one is presumed to intend the natural and probable consequences of his acts if, as in the Harvester Case, a number of persons who already control the greater part of the market in any commodity combine and it results in a strong control, it will be presumed that they combined with the intent to control the market. So it might be said that corporations, which have practically a monopoly on the trade of any article, if such corporation is formed from previously independent corporations, are *prima facie* illegal and the burden is on them to show that the combination was for a rightful purpose such as to secure greater industrial efficiency, or to turn out a better and cheaper article; that it was not for the purpose of controlling the market; that its methods were fair and did not interfere with the right of others to compete.[21]

Thus the Act has by no means been applied literally, and has not been applied to any contract, combination or monopoly which would not have been equally invalid in a proper proceeding under the rules of common law, but at the common law the United States could not as a party to a suit dissolve or in any way affect these combinations, where the only effect would be that agreements and contracts entered into in forming these combinations would not be enforced by the courts. By glancing over the past well-known cases [22] connected with this subject one can readily see the importance to the trusts of the additional remedy given by the Act.

In applying the foregoing principles to the Harvester Case we find that it is well in accord with previous decisions for there is present a control of an article greater than seventy-five per cent., and the intent to obtain control by combining companies, which companies deal extensively in interstate commerce. This latter element is necessary for the Act applies only where the restraint is an interstate or foreign trade whether it be direct or indirect, and does not apply to restraints of trades which are intrastate, for over the latter, Congress has no direct control.

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[19] 221 U. S. 31 (1911); 221 U. S. 106 (1911).

[20] Fuel Co. v. U. S., 115 Fed. Rep. 610 at 623 (1902); American Biscuit Co. v. Klotz, 44 Fed. Rep. 721 at 725 (1891); Whitwell v. Continental Tobacco Co., 123 Fed. Rep. 454 at 457 (1903).

[21] 25 HARV. L. R. 31 (1911).

[22] The Standard Oil Trust, The American Tobacco Trust, The Railroad Trusts, The Adyston Pipe & Steel Trust, and The Coal Trusts.

This control of trusts which thus affects the public by controlling its prices, and its wages to the laborer, may be justified when it is considered that these very trusts owe their existence to the states which allow them to incorporate. As the public created corporations for its own good, it should rightfully limit their functions and regulate their powers for its own good.[23]

Since the decision of this case, the Clayton Act was passed [24] "to supplement the existing laws against unlawful restraints and monopolies, and for other purposes." The same result would have been reached under this Act, though the means might have been different in that the motive of the combination seems to be immaterial and the degree of the monopoly created need not be so great, for Section Seven reads: "That no corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share of capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." It has not been decided how the words "substantially lessen competition" should be interpreted, but it clearly gives the courts greater power and freedom for dissolving such corporations as the International Harvester Company than did the Act of 1890.

E. H.

HOMICIDE—OPERATION OF AUTOMOBILES—A situation which promises to be of frequent occurrence in these modern times is where an automobilist, who is exceeding the speed limit or violating some traffic regulation, causes the death of a pedestrian or other occupant of the road, who may, under the circumstances, have made the wrong move, and the automobilist is thereupon indicted for involuntary manslaughter. Mere proof that he did an act which is prohibited by statute or valid ordinance will subject him to punishment for doing that act.[1] If he has been guilty of gross negligence in the operation of his automobile and that gross negligence is the cause of another death, he is guilty of manslaughter, regardless of violation of any statutory requirement.[2] The interesting case arises where, although violating a speed law, the automobile operator is

[23] For some valuable sources of information on this subject see 62 U. OF P. L. R. 73, 161, 241 (1914); 60 U. OF P. L. R. 311 (1912); 16 HARV. L. R. 79, 539 (1902); 22 HARV. L. R. 492 (1909); 23 HARV. L. R. 353 (1910); 25 HARV. L. R. 31 (1911); 17 HARV. L. R. 533 (1904); 12 COL. L. R. 450 (1911).

[24] October 15, 1914.

[1] Commonwealth v. Weiss, 139 Pa. 247 (1890); Holstead v. State, 41 N. J. L. 552 (1879).

[2] State v. Goetz, 76 Atl. Rep. 1000 (Conn. 1910).